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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

WELLINGTON SPENCER COPPESS,)
)
 Petitioner,)
)
 vs.)
)
 CHARLES L. RYAN, *et al.*,)
)
 Respondents.)

No. CIV 09-176-TUC-CKJ (HCE)

ORDER

On February 2, 2011, Magistrate Judge Hector C. Estrada issued a Report and Recommendation (Doc. 29) in which he recommended that the Petition under 28 U.S.C. § 2254 for a Writ of Habeas Corpus by a Person in State Custody filed by Wellington Spencer Coppess (“Coppess”) be dismissed in part and denied in part. The magistrate judge advised the parties that written objections to the Report and Recommendation were to be filed within fourteen days of service of a copy of the Report and Recommendation pursuant to 28 U.S.C. § 636(b). Coppess has filed an objection.

Factual and Procedural Background

The Court of Appeals of Arizona summarized the facts as follows:

. . . In March 2002, after a night of drinking, Coppess and his ex-wife, L., left a bar sometime between 1:00 and 1:30 a.m. L. was driving when they left the bar, but they began to argue on the way home, stopped at a park, and got out of the vehicle briefly. When they left the park, Coppess drove and headed east on Prince Road. A witness testified that Coppess was traveling between 100 and 120 miles per hour. Instead of stopping for a red light, Coppess attempted to pass other vehicles stopped at the light by swerving into the oncoming, westbound lanes of traffic. He lost control of the vehicle and struck an oncoming car.

1 During the collision, L. was thrown from the vehicle, and Coppess landed in the back
2 seat. Coppess left the vehicle and started walking away from the scene. When a
3 witness asked where he was going, he ran away. Police later found him hiding in a
nearby yard. Coppess was arrested, and subsequent testing of his blood established
he had an alcohol concentration of .117 percent.

4 The driver of the other car sustained bruising and deep lacerations. A female
5 passenger in that vehicle suffered a crushed left foot and ankle, broken pelvis, severed
6 aorta, and brain damage. Her fifteen-month-old son, who was riding in the back seat,
was killed. L. was rendered paraplegic and also sustained a punctured lung and
broken ribs and vertebrae.

7 Answer, Ex. I, pp. 3-4.¹ Coppess was subsequently convicted of one count of second degree
8 murder, five counts of aggravated assault, one count of leaving the scene, two counts of DUI,
9 and two counts of criminal damage. Coppess was sentenced to 44.5 years of imprisonment.
10 On May 27, 2005, the Court of Appeals affirmed Coppess' convictions, but ordered that
11 Coppess be resentenced. On February 28, 2006, upon remand from the Supreme Court of
12 Arizona, the Court of Appeals vacated its May 27, 2005, decision and affirmed Coppess'
13 convictions and sentences.

14 On February 16, 2006, while Coppess' direct appeal was pending on remand, Coppess
15 sought post-conviction relief on grounds that counsel was ineffective and that a dismissed
16 juror's conduct had tainted the remaining jurors such that his right to a fair and impartial jury
17 was violated. The post-conviction court denied relief and, on March 25, 2008, the Court of
18 Appeals granted review but denied relief.

19 On or about March 20, 2009, Coppess filed a Petition for Writ of Habeas Corpus.
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24 ¹See 28 U.S.C. § 2254(e)(1) ("In a proceeding instituted by an application for a writ
25 of habeas corpus by a person in custody pursuant to a judgment of a State court, a
26 determination of a factual issue made by a State court shall be presumed to be correct. The
27 applicant shall have the burden of rebutting the presumption of correctness by clear and
28 convincing evidence."); *Wainright v. Witt*, 469 U.S. 412, 426, 105 S.Ct. 844, 83 L.Ed.2d 841
(1985) (state court's findings are entitled to a presumption of correctness).

1 *Report and Recommendation*²

2 On February 20, 2011, the magistrate issued his Report and Recommendation in this
 3 case. This Court “may accept, reject, or modify, in whole or in part, the findings or
 4 recommendations made by the magistrate.” 28 U.S.C. § 636(b)(1); *see Schmidt v. Johnstone*,
 5 263 F.Supp.2d 1219, 1226 (D.Ariz. 2003) (reading the Ninth Circuit's decision in
 6 *Reyna-Tapia* as adopting the view that district courts are not required to review “any issue
 7 that is not the subject of an objection”); *United States v. Reyna-Tapia*, 328 F.3d 1114 (9th
 8 Cir.2003) (disregarding the standard of review employed by the district court when reviewing
 9 a report and recommendation to which no objections were made).

10
 11 *Timeliness of Petition*

12 The “AEDPA imposes a one-year statute of limitations on habeas corpus petitions
 13 filed by state prisoners in federal court.” *Patterson v. Stewart*, 251 F.3d 1243, 1245 (9th Cir.
 14 2001), *citing* 28 U.S.C. § 2244(d)(1)), *footnote omitted*. In this case, the magistrate judge
 15 determined that the Petition had been filed no later than March 23, 2009, and, therefore, was
 16 timely filed. No objection having been made as to this determination, the Court adopts this
 17 finding.

18
 19 *Claim I - Violation of Confrontational Rights Regarding Witness Voss*

20 The magistrate judge determined that Coppess had exhausted this claim in the state
 21 courts and addressed this issue on the merits. As to this claim, the Court of Appeals stated:

22 Coppess next argues the trial court erred when it “permitted a witness to testify that,
 23 at the accident scene, [L.] stated Coppess was driving.” According to Coppess, that
 evidence sabotaged “the heart of the defense’s theory that [he] was not the driver.”

24
 25 ²The Court notes that, after the issuance of the Report and Recommendation, the
 26 United States Supreme Court determined that in cases involving review under § 2254(d)(1),
 27 the review is “limited to the record that was before the state court that adjudicated the claim
 28 on the merits.” *Cullen v. Pinholster*, — U.S. —, 131 S.Ct. 1388, 1398 (2011).

1 Tucson Police Officer Charles Foley testified at trial that he had arrived on the
 2 accident scene at 1:55 a.m., only minutes after it had occurred. He saw L. still lying
 3 in the road, went to check her condition, and found her conscious. In response to the
 officer's question, L. stated that Coppess had been driving. Coppess's objection to
 that testimony on the ground of hearsay was overruled.

4 Coppess argues that the trial court should have sustained his hearsay objection and
 5 that the court also committed fundamental error by violating his "constitutional rights
 6 to confront the witnesses against him." U.S. Const. amend. VI; Ariz. Const. art. II,
 7 24. We review the court's evidentiary ruling for an abuse of discretion, *State v.*
Daniel, 169 Ariz. 73, 74, 817 P.2d 18, 19 (App. 1991), but review any confrontation
 8 clause issues raised below de novo. *State v. Bronson*, 204 Ariz. 321, ¶ 14, 63 P.3d
 9 1058, 1061 (App. 2003). We address the hearsay issue first in order to possibly
 avoid addressing the constitutional issue Coppess now raises. *See State v. Korzuch*,
 186 Ariz. 190, 195, 920 P.2d 312, 317 (1996) ("In general, . . . we should resolve
 cases on non-constitutional grounds in all cases where it is possible and prudent to do
 so.").

10 Citing Rule 801, Ariz. R. Evid., Coppess argues Foley's testimony was "paradigmatic
 11 hearsay." the state, however, maintains L.'s statement was admissible as an excited
 12 utterance under Rule 803(2), Ariz. R. Evid. That rule defines an "[e]xcited utterance"
 13 as a "statement relating to a startling event or condition made while the declarant was
 14 under the stress of excitement caused by the event or condition." Our supreme court
 has said that "[t]he exception requires proof of three elements: (1) a startling event,
 (2) a statement made soon after the event to ensure the declarant has no time to
 fabricate, and (3) a statement which relates to the startling event." *State v. Rose*, 198
 Ariz. 571, ¶ 20, 12 P.3d 796, 802 (2000).

15 L. made her statement to Officer Foley minutes after a fatal, high-speed automobile
 16 accident, while she still lay seriously injured in the street, reporting that "she could
 17 not feel below her waist." When Foley arrived on the scene, some bystanders "were
 18 trying to calm her down." The statement thus related to the event, the event was
 19 certainly startling, and the statement was made very shortly after the event. *See State*
v. Parks, 211 Ariz. 19, ¶¶ 10-11, 18, 39, 116 P.3d 631, 634-35, 639 (App. 2005) (trial
 20 court did not abuse its discretion in finding statements made by defendant's son to
 21 deputy att scene of shooting were excited utterances). As the state correctly points
 22 out, "a statement is not necessarily inadmissible because it is made in response to a
 23 question," even a police officer's question. *State v. Whitney*, 159 Ariz. 476, 483, 768
 P.2d 638, 645 (1989). In addition, "[t]he modern trend is toward a liberal
 24 interpretation of [the excited utterance] exception, leaving admissibility largely to the
 25 discretion of the trial court." *Id.* at 484, 768 P.2d at 646, quoting *State v. Rivera*,
 139 Ariz. 409, 410, 678 P.2d 1373, 1374 (1984); *see also State v. Alvarez*, 210 Ariz.
 24, ¶ 13, 107 P.3d 350, 354 (App. 2005). We cannot say, therefore, that the trial court
 26 abused its discretion in overruling Coppess's hearsay objection to Foley's testimony.

27 With respect to Coppess's Confrontation Clause argument, we first note he did not
 28 object below to Foley's testimony on that ground. Coppess's hearsay objection did
 not preserve this new argument. *See State v. Hernandez*, 170 Ariz. 301, 306-07, 823
 P.2d 1309, 1314-15 (App. 1991). Because Coppess failed to challenge Foley's
 testimony on Sixth Amendment grounds below, he "forfeit[ed] the right to obtain
 appellate relief" unless he "establish[es] both that fundamental error exists and that
 the error in his cases caused him prejudice." *State v. Henderson*, 210 Ariz. 561, ¶¶
 19, 20, 22, 115 P.3d 601, 607, 608 (2005); *see also State v. Martinez*, 210 Ariz. 578,

1 n.2, 115 P.3d 618, 620 n.2 (2005). And, fundamental error analysis is unnecessary
2 absent an initial finding “that the trial court committed some error.” *State v. Lavers*,
168 Ariz. 376, 385, 814 P.2d 333, 342 (1991).

3 Coppess argues the trial court fundamentally erred because he “could not confront
4 [L.] about the statement she allegedly made to Foley.” L., however, testified at trial,
albeit before Foley. Therefore, Coppess had an opportunity to cross-examine her on
5 all material topics, including her statement to Foley.

6 Foley testified that he had made an investigative report that specifically referred to
L.’s statement. Pursuant to Rule 15.1, Ariz. R. Crim. P. 16A A.R.S., the state was
7 required to disclose that report to Coppess before trial. Nothing in the record suggests
the state failed to do so or that Coppess was otherwise unaware of L.’s statement
8 before Foley testified. Thus, he could have cross-examined her about that statement.
Likewise, although L.’s testimony preceded Foley’s, Coppess could have called L. in
9 his case-in-chief after the state rested. As the Supreme Court stated in *Crawford v.*
Washington, 541 U.S. 36, 59 n. 9, 124 S.Ct. 1354, 1369 n. 9 (2004), “when the
10 declarant appears for cross-examination at trial, the Confrontation Clause places no
constraints at all on the use of [her] prior testimonial statements.” In sum, we find no
11 Confrontation Clause error, fundamental or otherwise, in the trial court’s admission
of Foley’s testimony about L.’s statement at the accident scene.

12 Finally, even were we to find that the trial court erred in admitting that portion of
Foley’s testimony, the error did not prejudice Coppess. *See Henderson*, 210 Ariz.
13 561, ¶¶ 20, 22, 115 P.3d at 607, 608. Substantial evidence beyond L.’s out-of-court
statement established that Coppess had been driving at the time of the accident. An
14 eyewitness testified that he had seen a man, whom he identified as Coppess, driving
the car. L. also testified that she remembered Coppess had been driving when they
15 left the park. The state’s accident reconstructionist also testified, based on the injuries
that Coppess and L. had sustained, that Coppess “would [have been] the driver.”
16 And, at the hospital, Coppess stated, “Please just kill me now if I hurt someone,” and
“oh God, what did I do?” In view of the totality of the evidence, Coppess has not
17 sustained his burden of establishing that any fundamental error relating to admission
of L.’s statement caused him prejudice. *Id.*

18 Answer, Ex. I, pp. 6-10, *footnote omitted*.

19 As pointed out by the magistrate judge, Coppess had a full and fair opportunity to
20 prepare for and anticipate Voss’s testimony as well as her out-of-court statements. Indeed,
21 although Coppess asserts in his objection that the trial court should have kept Voss under the
22 power of the subpoena, this does not change the fact that Coppess had a full and fair
23 opportunity to prepare for Voss’s testimony and had the opportunity to cross-examine her.
24 The Supreme Court has stated, “when the declarant appears for cross-examination at trial,
25 the Confrontation Clause places no constraints at all on the use of his [or her] prior
26 testimonial statements. *Crawford*, 541 U.S. at 59, n.9. Given the reasons the Arizona courts
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1 stated for not granting relief, this Court does not find that the state courts' decision involved an
 2 unreasonable application of federal law. *See* 28 U.S.C. § 2254(d) (habeas relief not available
 3 with respect to a claim unless the state courts' adjudication of it "resulted in a decision that
 4 was contrary to, or involved an unreasonable application of, clearly established federal law,
 5 as determined by the Supreme Court of the United States"). Moreover, the Court agrees with
 6 the magistrate judge that there has been no showing that the state court rulings were based
 7 on an unreasonable determination of that facts in light of the evidence. This claim will be
 8 denied on this merits.

9
 10 *Claim II – Sentence in Violation of Blakely v. Washington*

11 Coppess asserts that his right to a jury trial as set forth in the *Blakely v. Washington*,
 12 542 U.S. 296 (2004), and *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), was violated
 13 by the court's imposition of an aggravated sentence without a jury determination of
 14 aggravating factors. As to this issue, the Court of Appeals stated:

15 Coppess lastly argues "[t]he trial court violated Coppess's constitutional jury trial and
 16 due process rights when it imposed aggravated sentences [on his second-degree
 17 murder conviction and four of the aggravated assault convictions] based on facts not
 18 inherent in the jury's verdict." At sentencing, the trial court found the following
 19 aggravating circumstances: emotional, physical and financial harm to the victims;
 20 Coppess's prior felony and misdemeanor convictions; Coppess's extensive criminal
 21 history; Coppess's danger to society, and his "recidivist conduct." The court also
 22 found "the unique factors of [the] case" as aggravating circumstances, including
 23 Coppess's BAC of .117; Coppess's "indication to individuals . . . at the bar" that he
 24 knew he was drunk; and Coppess's having been in an accident the week before the
 25 offense. The court found two mitigating factors: the victims' failure to use seat belts
 26 or a child restraint seat and "any [of Coppess's] potential mental health issues."

27 Because Coppess failed to object below to the trial court's imposition of aggravated
 28 sentences, we review solely for fundamental error. *Martinez*, 210 Ariz. 578, n. 2, 115
 P.3d att 620 n. 2. As noted earlier, Coppess has the burden to show fundamental error
 occurred and the error caused him prejudice. *Henderson*, 210 Ariz. 561, ¶ 20, 115
 P.3d at 607. Fundamental error is "error going to the foundation of the case, error
 that takes from the defendant a right essential to his defense, and error of such
 magnitude that the defendant could not possibly have received a fair trial." *Id.* ¶ 19,
 quoting *State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984).

In *Martinez*, our supreme court held that one *Blakely*-compliant or *Blakely*-exempt
 factor is enough to allow the trial court to consider other aggravating factors in
 sentencing the defendant. 210 Ariz. 578, ¶ 26, 115 P.3d at 625; *see also State v.*

1 *Anderson*, 211 Ariz. 59, ¶ 8, 116 P.3d 1219, 1221-22 (2005); *State v. Glassel*, 211
 2 Ariz. 33, ¶ 102, 116 P.3d 1193, 1217 (2005). A finding of prior conviction is a
 3 *Blakely*-exempt aggravating circumstance. *Blakely*, 542 U.S. at 301, 124 S.Ct. at
 4 2536; *see also Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 2362-63,
 5 147 L.Ed.2d 435, 455 (2000); *Anderson*, 211 Ariz. 59, n. 2 116 P.3d at 1221 n. 2.
 Thus, the trial court's finding Coppess's prior convictions as an aggravating factor,
 a finding he neither challenged below nor contests on appeal, did not violate *Blakely*.
See State v. Keith, 211 Ariz. 436, ¶ 3, 122 P.3d 229, 230 (App. 2005) (prior
 convictions are exempt from requirements of *Blakely*).

6 “Accordingly, once the trial court found that [Coppess's] prior convictions were an
 7 aggravating circumstance, the court was entitled to consider any other legal
 8 aggravating factor in imposing sentence.”⁷ *State v. Burdick*, 211 Ariz. 583, ¶ 13, 125
 P.3d

9 ⁷In his reply brief, Coppess argues *Almendarez-Torres v. United States*, 523
 10 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998), “is no longer the law and
 11 prior convictions – like any other fact necessary to increase a sentence, must
 12 be found by a jury under the reasonable doubt standard.” Coppess waived
 13 those new arguments by failing to raise them below or in his opening brief.
 14 *State v. Glassel*, 211 Ariz. 33, n. 17, 116 P.3d 1193, 1217 n. 17 (2005). Even
 15 if the claims were not waived, however, we are bound by the decisions of our
 16 supreme court, such at *State v. Ring*, 204 Ariz. 534, ¶¶ 64-66, 65 P.3d 915, 939
 17 (2003) (*Ring III*), finding prior convictions *Apprendi*-a-exempt. *See State v.*
 18 *Smyers*, 207 Ariz. 314, n. 4, 86 P.3d 370, 374 n. 4 (2004). We are likewise
 19 bound by United States Supreme Court decisions, including *Almendarez-*
 20 *Torres*, *Apprendi*, and *Blakely*. *See State v. Davis*, 206 Ariz. 377, n. 4, 79 P.3d
 64, 71 n. 4 (2003); *Kroeger v. Twin Buttes R.R. Co.*, 13 Ariz. 348, 350, 114 P.
 553, 554 (1911). And, in any event, both our supreme court and this court
 have rejected an argument similar to the one Coppess raises. *See State v.*
Anderson, 211 Ariz. 59, n. 2, 116 P.3d 1219, 1221 n. 2 (2005); *State v. Molina*,
 211 Ariz. 130, n. 6, 118 P.3d 1094, 1101 n. 6 (App. 2005) (*Blakely*-exempt
 aggravated factors need be supported only by reasonable evidence in the
 record); *see also State v. Urquidez*, No. 2 CA-CR 2004-0419, n. 1, 2006 WL
 233431 (Ariz.App. Jan. 31, 2006) (same). Finally, we do not address
 Coppess's assertions, raised for the first time in his reply brief, that our
 reasoning and holding in a sentence enhancement case, *State v. Cons*, 208
 Ariz. 409, 94 P.3d 609 (App. 2004), are “flawed,” and that he “had the right
 to have a jury find prior convictions under the reasonable doubt standard.”

1039, 1042 (App. 2005). Therefore, we find no error, fundamental or otherwise,
 relating to the trial court's sentencing of Coppess. *See id.*; *see also Anderson*, 211
 Ariz. 59, ¶ 8, 116 P.3d at 1221-22.

23 Answer, Ex. I, pp. 14-17.

24 As pointed out by the magistrate judge and the state court, once an aggravating factor
 25 has been properly established as either *Blakely*-exempt or *Blakely*-compliant, additional
 26 aggravating factors may be found and considered by the sentencing court in determining the
 27 appropriate sentence to be imposed within the given statutory sentencing range. *Martinez*,

210 Ariz at 585, 115 P.3d at 625; *Apprendi*, 530 U.S. at 481. The consideration of aggravating factors, including Coppess's prior conviction, by the sentencing court in imposing an aggravated sentence within the range prescribed by statute did not violate *Blakely*. The Court finds that the state court's decision upholding Coppess's sentences was not contrary to, or an unreasonable application of, clearly established federal law as determined by the United States Supreme Court, *see Jernigan v. Tucker*, 2007 WL 163079 (D.Ariz. Jan. 18, 2007) (denying habeas petition raising *Blakely* claim because "[o]nce one [prior] conviction has been established, the judge is free to impose the maximum sentence . . ." within the applicable sentencing range), and was not based on an unreasonable determination of the evidence presented. This claim will be denied on the merits.

Claim III – Expert Testimony

Coppess asserted that his right to due process was violated with regard to his ability to present expert testimony from either Dr. Richard Hinton or Dr. Comer.³ The magistrate judge determined that, despite any confusion between Dr. Hinton and Dr. Comer, Coppess failed to establish cause for failing to fairly present the state court with a Fourteenth Amendment due process claim with regard to either Dr. Hinton's or Dr. Comer's testimony and, therefore, recommends the Court dismiss Count III as procedurally defaulted. Coppess has not objected to this determination and recommendation. The Court finds it appropriate to adopt this portion of the Report and Recommendation. *Thomas v. Arn*, 474 U.S. 140, 149-50, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985) (The statute does not "require [] some lesser review by [the court] when no objections are filed[;]" the court is not required to conduct "any review at all . . . of any issue that is not the subject of an objection."); *Reyna-Tapia*. This claim will be dismissed as procedurally defaulted.

³As discussed by the magistrate judge, Coppess's Petition refers to Dr. Hinton, but Coppess's Supplemental Reply indicates that Coppess sought to present testimony of Dr. Comer.

1 *Claim IV – Ineffective Assistance of Counsel*

2 Coppess asserted that his Sixth Amendment right to counsel was violated because his
3 trial counsel was ineffective for failing to: (1) call Dr. Hinton to testify at trial regarding
4 Coppess's PTSD; (2) object to admission of evidence regarding Coppess's blood alcohol
5 level; (3) inform Coppess of a plea offer made by the State prior to a July 25, 2003 hearing;
6 (4) find or call witnesses who made statements to the police that Coppess was not driving the
7 car; and (5) call Dr. Comer to testify about Coppess's mental competency and mitigating
8 factors given that "Dr. Comer examined the [Coppess] for 8 hours and had a diagnose's [sic]
9 of frontal lobe brain injury . . ." Petition, p. 9. The magistrate judge determined, contrary
10 to Respondents' argument, that these claims are exhausted by presentation to the Court of
11 Appeal of Arizona. Respondents have not objected to this determination. The Court will
12 adopt this portion of the Report and Recommendation.

13
14 *Failure to Call Dr. Hinton as a Witness*

15 As to Coppess's claim that trial counsel was ineffective for failing to call Dr. Hinton
16 to testify regarding Coppess's alleged PTSD, the magistrate judge determined that Coppess
17 had abandoned this claim and recommends this claim be dismissed as withdrawn. Coppess
18 has not objected to this finding and recommendation. The Court will adopt this portion of
19 the Report and Recommendation and will dismiss this claim as withdrawn.

20
21 *Failure to Object of Admission of BAC*

22 Coppess asserted that trial counsel was ineffective for failing to object to the
23 admission of Coppess's BAC level. The magistrate judge determined that the state court, in
24 applying *Strickland*, applied the correct law to the case and that there was no showing that
25 there was a reasonable probability that, but for counsel's failure to object to Officer
26 Widener's reference to reports generated at the time of the blood draw, the outcome of
27 Coppess's trial would have been different or that, under prevailing professional norms,
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1 counsel should have objected on this issue. The magistrate judge further determined that the
2 state court's ruling on this issue was not contrary to, or an unreasonable application of,
3 clearly established federal law as determined by the United States Supreme Court and that
4 the state court's proceeding did not result in a decision that was based on an unreasonable
5 determination of the evidence presented. Further, the magistrate judge also determined that
6 to any extent Coppess was asserting that trial counsel was ineffective by allowing the BAC
7 into evidence, this claim was not raised in the Petition for Post-Conviction Relief and was,
8 therefore, procedurally defaulted. The magistrate judge also determined that the claim was
9 without merit.

10 In his objections addressing claim IV, Coppess only refers to those claims regarding
11 counsel's failure to call witnesses and failure to hire an investigator. In other words, Coppess
12 has not objected to the findings and recommendations regarding the admission of Coppess's
13 BAC level. The Court will adopt this portion of the Report and Recommendation.

14
15 *Failure to Advise Coppess of Plea Offer*

16 Coppess has asserted that counsel was ineffective for failing to advise him of a plea
17 offer made by the State prior to a July 25, 2003, hearing. The magistrate judge determined
18 that the record unequivocally contradicted Coppess's claim, the state court's ruling on this
19 issue was not contrary to, or an unreasonable application of, clearly established federal law
20 as determined by the United States Supreme Court, and that the state court's proceeding did
21 not result in a decision that was based on an unreasonable determination of the evidence
22 presented.

23 In his objections addressing claim IV, Coppess only refers to those claims regarding
24 counsel's failure to call witnesses and failure to hire an investigator. In other words, Coppess
25 has not objected to the findings and recommendations regarding whether counsel advised
26 Coppess of the plea offer. The Court will adopt this portion of the Report and
27 Recommendation.

1 *Failure to Find and Call Witnesses*

2 Coppess has asserted that trial counsel was ineffective for failing to find or call
3 witnesses who made statements to the police that Coppess was not driving the car. The
4 magistrate judge determined that this claim had not been presented in the post-conviction
5 proceeding, was procedurally defaulted, no cause and prejudice to excuse the procedural
6 default had been established, and no fundamental miscarriage of justice had been
7 demonstrated. The magistrate judge recommended this claim be dismissed as procedurally
8 defaulted.

9 In his objections, Coppess has asserted that all of the claims were properly raised in
10 the Arizona courts and that this claim clearly meets “the two part test of Strickland in regards
11 to deficient performance by counsel. Trial counsel’s critical errors prior to trial, and during
12 trial did prejudice [Coppess], and is a Sixth Amendment violation. Objection (Doc. 30), p.
13 3.

14 As explained by the magistrate judge:

15 “Petitioner’s assertion of a claim of ineffective assistance of counsel based on one set
16 of facts [presented to the state courts], does not exhaust other claims of ineffective
17 assistance of counsel based on different facts” that were not presented to the state
18 courts. *Date*, 619 F.Supp.2d at 788. *See also Moormann v. Schriro*, 426 F.3d 1044,
1056-57 (9th Cir. 2005), *cert. denied*, 548 U.S. 927 (2006) (new allegations of
ineffective assistance of counsel not previously raised before the state court cannot
be addressed on habeas review).

19 Report and Recommendation, p. 43.

20 Coppess asserted in the state court proceedings that counsel was ineffective on various
21 grounds. However, Coppess never argued counsel was ineffective for failing to find or call
22 witnesses to testify that Coppess was not the driver of the car involved in the accident. The
23 Court finds, therefore, that this claim has not been exhausted. Moreover, if Coppess were
24 to fairly present this issue in a subsequent Petition for Post-Conviction Relief, such
25 presentation would be untimely. Ariz.R.Crim.P. 32.1 and 32.4(a). Further, such presentation
26 would be futile as the claim is precluded as waived. Ariz.R.Crim.P. 32.2(a)(3). Such a new
27 petition, therefore, would be subject to summary dismissal. *State v. Rosario*, 195 Ariz. 264,
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266, 987 P.2d 226, 228 (Appl 1999); *Moreno v. Gonzales*, 192 Ariz. 131, 135, 962 P.2d 205, 209 (1998).

Additionally, Coppess has failed to establish (1) cause sufficient to excuse his procedural default – any impediments preventing Coppess from complying with Arizona's procedural rules, *Murray v. Carrier*, 477 U.S. 478, 488, 106 S.Ct. 2639, 2645, 91 L.Ed.2d 397 (1986), (2) prejudice – any constitutional violation so basic as to infect Coppess's entire proceedings with error, *United States v. Frady*, 456 U.S. 152, 170, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982), or (3) fundamental miscarriage of justice that no reasonable juror could find him guilty, *Schlup v. Delo*, 513 U.S. 298, 327, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995). Coppess's procedural default cannot be excused. The Court will adopt this portion of the Report and Recommendation and dismiss this claim as procedurally defaulted.

Failure to Call Expert Witness as to Mental Competency and Mitigating Factors

Coppess has asserted that counsel was ineffective for failing to call an expert witness regarding Coppess's mental competency and mitigating factors. As to Coppess's claim regarding Dr. Comer's diagnosis of a frontal lobe brain injury, the magistrate judge determined this claim was procedurally defaulted.

In his objections, Coppess has asserted that all of the claims were properly raised in the Arizona courts and that this claim clearly meets "the two part test of Strickland in regards to deficient performance by counsel. Trial counsel's critical errors prior to trial, and during trial did prejudice [Coppess], and is a Sixth Amendment violation." Objection (Doc. 30), p. 3.

As stated by the magistrate judge:

Petitioner raised in his PCR proceeding only the issue whether trial counsel was ineffective for failure to call Dr. Comer to testify about Petitioner's PTSD. (See Answer, Exh. L, pp. 6-7; Doc. 28, Exh. 1, pp. 7-9). Because Petitioner never argued to the state court that trial counsel was ineffective for failing to call Dr. Comer to testify that Plaintiff suffered from an alleged frontal lobe brain injury, the claim is not exhausted. Moreover, Petitioner cannot now return to state court to raise the issue in a second post-conviction relief proceeding.

1 Report and Recommendation, p. 44.

2 Coppess asserted in the state court proceedings that counsel was ineffective on various
3 grounds. However, Coppess never argued counsel was ineffective for failing to call Dr.
4 Comer to testify regarding a diagnosis of a frontal lobe brain injury. The Court finds,
5 therefore, that this claim has not been exhausted. Moreover, if Coppess were to fairly present
6 this issue in a subsequent Petition for Post-Conviction Relief, such presentation would be
7 untimely. Ariz.R.Crim.P. 32.1 and 32.4(a). Further, such presentation would be futile as the
8 claim is precluded as waived. Ariz.R.Crim.P. 32.2(a)(3). Such a new petition, therefore,
9 would be subject to summary dismissal. *Rosario*, 195 Ariz. at 266, 987 P.2d at 228.

10 Additionally, Coppess has failed to establish cause sufficient to excuse his procedural
11 default. Coppess's claim that appellate and post-conviction counsel confused Dr. Hinton
12 with Dr. Comer has not been presented to the state courts. To rely on ineffective assistance
13 of counsel to excuse a procedural default, the claim of ineffective assistance of counsel must
14 itself have been fairly presented to the state court. *See Edwards v. Carpenter*, 529 U.S. 446,
15 451-54 (2000) (allegation of ineffective assistance of counsel as cause for procedural default
16 "is itself an independent constitutional claim" and is subject to the same exhaustion
17 requirement as other habeas claims). Moreover, Coppess has not demonstrated prejudice,
18 *Frady*, 456 U.S. at 170, or a fundamental miscarriage of justice, *Schlup*, 513 U.S. at 327.
19 Coppess's procedural default cannot be excused. The Court will adopt this portion of the
20 Report and Recommendation and dismiss this claim as procedurally defaulted.

21 As to Coppess's claim that counsel was ineffective for failing to call Dr. Comer to
22 testify about Coppess's PTSD, the post-conviction court stated:

23 Counsel was not ineffective for failing to call Dr. Comer to testify as to Petitioner's
24 post-traumatic stress disorder ("PTSD"), and how such contribution might have
25 influenced Petitioner's reactions to the accident, such as fleeing and making odd
statements to witnesses.

26 Under [*Strickland*], adopted by *State v. Nash*, 143 Ariz. 392, 694 P.2d 222 (1985),
27 cert. denied, 471 U.S. 1143, 105 S.Ct. 2689 (1985), Petitioner must show that (1) his
counsel's performance fell below an objective standard of reasonableness, as
evidenced by prevailing professional norms and (2) that deficient performance

1 resulted in prejudice to Petitioner. There is a strong presumption that counsel's
 2 actions are made for strategic or tactical purposes, and that presumption controls
 3 unless petitioner can show that counsel's actions "revealed ineptitude, inexperience,
 4 or lack of preparation." *State v. Santanna*, 153 Ariz. 147, 835 P.2d (1987); *State v.*
 5 *Goswick*, 142 Ariz. 582, 691 P.2d 673 (1984). Furthermore, counsel's decisions are
 6 not to be judged in hindsight. *State v. Salazar*, 146 Ariz. 540, 707 P.2d 944 (1985).
 7 Tactical decisions are committed to counsel's own judgment. *State v. Beaty*, 158
 8 Ariz. 232, 762 P.2d 519 (1988).

9 Petitioner may have sustained his PTSD as a result of situations he found himself in
 10 while being incarcerated in jail or prison. The Court had ruled that if defense counsel
 11 opened the issue of PTSD, the State was free to cross-examine on the origins of the
 12 PTSD, allowing the jury to hear about Petitioner's prior 10-year incarceration in the
 13 Department of Corrections. Petitioner argues that had the jury heard that he fled the
 14 scene of the accident because of PTSD, it would not have convicted him as it could
 15 have inferred that the behavior stemmed from an underlying mental health issue.

16 Petitioner has not overcome the strong presumption that counsel's decision not to call
 17 Dr. Comer was strategic. *Santanna, Goswick, supra*. Petitioner does not suggest how
 18 counsel could have avoided the topic of prison in examining Dr. Comer while still
 19 having the expert reveal that Petitioner originally suffered from PTSD there.
 20 Petitioner has failed to meet the first prong of the *Strickland* test. Petitioner has
 21 further failed to show any prejudice as a result of counsel's performance. While the
 22 jury did not hear any evidence as to Petitioner's post-traumatic stress disorder, it also
 23 did not hear evidence as to Petitioner's incarceration. Petitioner has not demonstrated
 24 any prejudice, and has not met the second prong of the *Strickland* test.

25 Answer, Ex. M, p 2-3.⁴

26 The state court applied the correct legal standard in addressing this issue. Moreover,
 27 the trial court had ruled that, if Dr. Hinton testified about Coppess's PTSD, the State could
 28 question him regarding the prison setting of Coppess's experiences with regard to PTSD.
 Dr. Comer would have, similarly, been subject to cross-examination on the issue of
 Coppess's prior incarceration – Dr. Comer noted that Coppess's PTSD was related, in part,
 to "prison experience". See Coppess's Supplemental Reply, Ex. A, p. 2. As stated by the
 magistrate judge:

The record is clear that trial counsel made the strategic decision not to call Dr. Hinton

⁴The Court of Appeals, in granting review and denying relief, stated that, "[b]ecause
 the court's order denying relief clearly identified the issues and correctly ruled on them so
 that any court in the future can understand it, and because the court's findings and
 conclusions are supported by the records before us, we adopt the trial court's ruling."
 Answer, Ex. N, p. 2.

1 based on that ruling and it follows that counsel would not have called Dr. Comer, had
2 he been listed as a witness, for the same reason. Given the potentially prejudicial
3 impact that testimony about Petitioner's prior incarceration would have had, trial
counsel's decision not to call an expert to testify about Petitioner's PTSD was a
reasonable strategic decision.

4 Report and Recommendation, p. 47. Moreover, it is not clear that Dr. Comer would have
5 testified that Coppess's post-accident actions were attributable to PTSD – his report does not
6 discuss Coppess's post-accident behavior. The Court finds that it is not reasonably likely
7 that Dr. Comer's opinions regarding Coppess's PTSD, in conjunction with the jury learning
8 of Coppess's prior incarceration, would have altered the outcome of the trial. *Harrington v.*
9 *Richter*, — U.S. —, 131 S.Ct. 770, 791-92, 178 L.Ed.2d 624 (2011). Further, the Court finds
10 that the state court's decision that Coppess failed to establish prejudice under *Strickland* was
11 not contrary to, or an unreasonable application of clearly established federal law as
12 determined by the United States Supreme Court and the state court's proceeding did not
13 result in a decision that was based on an unreasonable determination of the evidence
14 presented. The Court will adopt this portion of the Report and Recommendation and deny
15 habeas relief on the merits of this claim.

16
17 *Claim V – Fair and Impartial Jury*

18 Coppess asserts that the trial court violated his right to a fair and impartial jury. The
19 magistrate judge determined that state courts had determined that this claim was waived
20 pursuant to Ariz.R.Crim.P. 32.2(a)(3) and recommends that this claim be dismissed as
21 procedurally defaulted. Coppess has not objected to this determination and recommendation.
22 The Court finds it appropriate to adopt this portion of the Report and Recommendation.
23 *Thomas*, 474 U.S. at 149-50. This claim will be dismissed as procedurally defaulted.

24
25 *Certificate of Appealability (“COA”)*

26 Rule 11(a), Rules Governing Section 2254 Cases, requires that in habeas cases the
27 “district court must issue or deny a certificate of appealability when it enters a final order
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1 adverse to the applicant.” Such certificates are required in cases concerning detention arising
2 “out of process issued by a State court”, or in a proceeding under 28 U.S.C. § 2255 attacking
3 a federal criminal judgment or sentence. 28 U.S.C. § 2253(c)(1). Here, the Petition is
4 brought pursuant to 28 U.S.C. § 2254, and challenges detention pursuant to a State court
5 judgment. This Court must determine, therefore, if a COA shall issue.

6 The standard for issuing a COA is whether the applicant has “made a substantial
7 showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). “Where a district
8 court has rejected the constitutional claims on the merits, the showing required to satisfy §
9 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would
10 find the district court's assessment of the constitutional claims debatable or wrong.” *Slack*
11 *v. McDaniel*, 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000). “When the district
12 court denies a habeas petition on procedural grounds without reaching the prisoner's
13 underlying constitutional claim, a COA should issue when the prisoner shows, at least, that
14 jurists of reason would find it debatable whether the petition states a valid claim of the denial
15 of a constitutional right and that jurists of reason would find it debatable whether the district
16 court was correct in its procedural ruling.” *Id.*; *see also Robbins v. Carey*, 481 F.3d
17 1143,1146-47 (9th Cir. 2007) (failure to object to magistrate judge’s conclusions does not
18 automatically waive appellate challenge) In the certificate, the Court must indicate which
19 specific issues satisfy the showing. *See* 28 U.S.C. § 2253(c)(3).

20 In this case, the Court has determined that the claims regarding (1) whether Coppess’s
21 right to due process was violated as to his ability to present expert testimony from either Dr.
22 Richard Hinton or Dr. Comer, (2) alleged ineffectiveness of trial counsel for failing to call
23 Dr. Comer to testify about Coppess’s alleged frontal lobe brain injury, and (3) whether the
24 trial court violated Coppess’s right to a fair and impartial jury should be dismissed as
25 procedurally defaulted. The Court further determined that Coppess’s claim of alleged
26 ineffectiveness of trial counsel for failing to call Dr. Hinton to testify regarding Coppess’s
27 alleged PTSD should be dismissed as withdrawn. The Court finds that jurists of reason
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1 would not find it debatable whether the Petition stated a valid claim of the denial of a
2 constitutional right and the Court finds that jurists of reason would not find it debatable
3 whether the district court was correct in its procedural ruling. A COA shall not issue as to
4 these claims.

5 The Court also determined that Coppess was not entitled to habeas relief on the merits
6 as to his claims that (1) his confrontation rights were violated as to witness Voss, (2) he was
7 sentenced in violation of *Blakely*, (3) counsel was ineffective for failing to object to
8 admission of evidence regarding Coppess's blood alcohol level; (4) counsel was ineffective
9 for failing to inform Coppess of a plea offer made by the State prior to a July 25, 2003
10 hearing, and (5) counsel was ineffective for failing to call Dr. Comer to testify about
11 Coppess's PTSD. The Court finds that reasonable jurists would not find the district court's
12 assessment of the constitutional claims debatable or wrong.

13 Any further request for a COA must be addressed to the Court of Appeals. *See* Fed.
14 R.App. P. 22(b); Ninth Circuit R. 22-1.

15 Accordingly, IT IS ORDERED:

16 1. The Report and Recommendation [Doc. # 29] is ADOPTED.

17 2. Coppess's Petition under 28 U.S.C. § 2254 for a Writ of Habeas Corpus by a
18 Person in State Custody is DISMISSED WITH PREJUDICE as to the claims regarding (1)
19 whether Coppess's right to due process was violated as to his ability to present expert
20 testimony from either Dr. Richard Hinton or Dr. Comer, (2) alleged ineffectiveness of trial
21 counsel for failing to call Dr. Comer to testify about Coppess's alleged frontal lobe brain
22 injury, (3) whether the trial court violated Coppess's right to a fair and impartial jury, and (4)
23 alleged ineffectiveness of trial counsel for failing to call Dr. Hinton to testify regarding
24 Coppess's alleged PTSD.

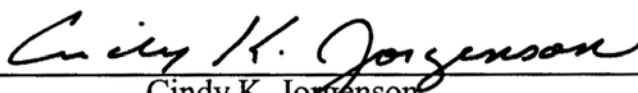
25 3. Coppess's Petition under 28 U.S.C. § 2254 for a Writ of Habeas Corpus by a
26 Person in State Custody is DENIED as to Coppess's claims that (1) his confrontation rights
27 were violated as to witness Voss, (2) he was sentenced in violation of *Blakely*, (3) counsel
28

1 was ineffective for failing to object to admission of evidence regarding Coppess's blood
2 alcohol level; (4) counsel was ineffective for failing to inform Coppess of a plea offer made
3 by the State prior to a July 25, 2003 hearing, and (5) counsel was ineffective for failing to
4 call Dr. Comer to testify about Coppess's PTSD.

5 4. The Clerk of the Court shall enter judgment and shall then close its file in this
6 matter.

7 5 A Certificate of Appealability shall not issue in this case.

8 DATED this 18th day of April, 2011.

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11 
12 Cindy K. Jorgenson
13 United States District Judge
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